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No. 86-422

In the Supreme Court of the United States

OCTOBER TERM, 1986

DAVID CARPENTER, KENNETH P. FELIS, AND R. FOSTER WINANS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' trading in securities on confidential information that had been misappropriated in breach of a fiduciary duty violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5.

2. Whether petitioners' trading in securities on the basis of this misappropriated information violated the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 791 F.2d 1024. The opinion of the district court (Pet. App. 33a-73a) is reported at 612 F. Supp. 827.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1986. Petitions for rehearing were denied on July 17, 1986 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on September 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Southern District of New York, petitioners Felis and Winans were convicted of conspiracy to commit fraud and to obstruct justice, in violation of 18 U.S.C. 371; they and petitioner Carpenter also were convicted of a number

of counts charging securities fraud, in violation of 15 U.S.C. 78j(b), 17 C.F.R. 240.10b-5, and 18 U.S.C. 2; mail fraud, in violation of 18 U.S.C. 1341; and wire fraud, in violation of 18 U.S.C. 1343. Petitioner Carpenter was sentenced to concurrent terms of three years' probation and to concurrent $1000 fines on six counts of securities fraud, three counts of mail fraud and three counts of wire fraud. Petitioner Winans was sentenced to concurrent terms of 18 months' imprisonment on one count of conspiracy, five counts of mail fraud, and five counts of wire fraud; he also was assessed concurrent $5000 fines on the conspiracy count and on each of five counts of securities fraud, as well as concurrent $1000 fines on five counts of mail fraud and five counts of wire fraud, and was placed on five years' probation. Petitioner Felis was sentenced to concurrent six month sentences on one conspiracy count and on five counts each of securities, mail, and wire fraud; he also was fined a total of $25,000 (specifically, fines of $10,000 on the conspiracy count, $5000 on one count of securities fraud, and $1000 on each of five counts of mail and of wire fraud), and was placed on five years' probation.

1. Petitioner Winans was a reporter for the Wall Street Journal (Journal) and one of two full-time writers responsible for the Journal's "Heard on the Street" column (Heard column) (Pet. App. 5a, 35a). This widely-read column is a daily feature that typically discusses significant developments concerning a particular stock or group of stocks and expresses a point of view about the prospects for the company or stock reviewed (*ibid.*). The column often has a significant impact on the market price of the stocks that it discusses (*id.* at 17a n.8, 19a n.9, 35a-36a).

When Winans was hired, and periodically thereafter, he was informed that Dow Jones & Co., the Journal's publisher, maintained a conflicts of interest policy prohibiting its employees from purchasing or selling securities in anticipation of forthcoming articles (Pet. App. 6a, 36a-37a).

The policy further provided that "all material gleaned * * * in the course of * * * work for Dow Jones is deemed to be strictly the company's property" and "must never be disclosed to anyone outside the Company." Specifically placed in this category was "information on plans for running items and articles on particular companies." *Id.* at 36a; C.A. App. 113.[1]

2. Despite his awareness of the Dow Jones policy, in October 1983 Winans entered into an agreement with two stockbrokers at Kidder, Peabody & Co. (Kidder), Peter Brant and petitioner Felis, to leak confidential information concerning "the timing, subject, and tenor" of future Heard columns (Pet. App. 40a).[2] The agreement envisioned

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[1] Petitioners state that this policy was "contained at the back of a 40-page pamphlet" (Pet. 6), was not contained in Dow Jones' collective bargaining agreement with Winans' union (*id.* at 7), and was "convoluted, ambiguous, and technical" (*id.* at 18 n.38). The district court, however, found that "Winans had actual knowledge of the policy with respect to maintaining the confidentiality of the column," and that he "also knew that he was supposed to tell his editors if he heard that word was out about a column's topic"; the court found "incredible Winans['] denial that he ever received the conflicts of interest policy statements" (Pet. App. 37a; see *id.* at 6a).

[2] Petitioners state that "[a]t Winans' insistence * * * it was agreed that neither the accuracy nor the journalistic integrity of any article would be compromised, and this promise was fulfilled" (Pet.7). The district court, however, noted (Pet. App. 45a) Winans' testimony before the Securities and Exchange Commission that the "promise of a big distribution of profits" from Brant "was 'an inducement' and a factor in his choosing" to write about a certain stock. While the court noted Winans' later testimony that he in fact exercised independent journalistic judgment in deciding to write the column in question, the district judge did "not accept [Winans'] rejection of his SEC testimony; rather, [he] accepted it as evidence of Winans' criminal intent." *Ibid.* In any event, the court found that "[m]aintaining the journalistic purity of the column was actually consistent with the goals of the conspirators" because "a particularly compelling column or a fresh investment thesis would have a significant impact on the price of the featured stock" (*id.* at 44a n.4).

that Brant and Felis would use Winans' information to trade on the stocks to be discussed in the column, with the conspirators sharing the profits (*id.* at 6a-7a, 40a-42a). Petitioner Carpenter, a former news clerk at the Journal and a close friend of Winans, acted as a messenger between the conspirators (*id.* at 5a-6a).

Over a five-month period, Winans leaked advance information to Brant and Felis concerning approximately 27 columns (Pet. App. 7a). Using this information, Brant and Felis engaged in large-scale securities transactions, buying stock or call options in advance of positive columns, and selling short (or buying put options) in advance of negative columns (*id.* at 6a, 42a). By generally closing their position on the day of publication, they took maximum advantage of the Heard column's short-term market impact (*id.* at 42a). Winans also used his knowledge about forthcoming columns to trade for the account of Carpenter, who assisted in the completion of six such transactions (*id.* at 45a). These activities netted petitioners and their confederates trading profits of almost $700,000 (*id.* at 7a, 42a).

During the course of the scheme, petitioners adopted elaborate strategems to avoid detection. Winans telephoned Brant or Felis from empty Journal offices or outside pay phones and frequently used a false name when identifying himself to Brant's secretary (Pet. App. 7a, 42a). Felis and Brant in turn paid Winans his share of the trading profits by checks made payable to Carpenter. To support a cover story that those checks represented payments for decorating services, Felis wrote the word "drapes" on a $10,000 check; Carpenter subsequently provided Brant and Felis with false invoices for decorating services (*id.* at 7a, 40a, 43a, 47a-49a).

Petitioners and Brant continued trading in securities even after their activities had aroused suspicion. When questioned by Kidder's Regional Manager, Felis and Brant

lied about the source of their information; after being told to stop their trading, they liquidated their existing account but opened a Swiss bank account in the name of a shell corporation through which they continued to trade (Pet. App. 7a, 46a). Petitioners and Brant subsequently misled the Securities and Exchange Commission (SEC) and the Journal when questioned about their activities (*id.* at 7a, 47a-48a).

3. Petitioners were convicted following a 20-day bench trial. In sustaining the convictions for securities fraud, the district court explained that " 'one who misappropriates nonpublic information in breach of a fiduciary duty and trades on that information to his own advantage violates Section 10(b) [of the Securities Act of 1934, 15 U.S.C. 78j(b)] and Rule 10(b)(5) [17 C.F.R. 240.10b-5]' " (Pet. App. 53a (citation omitted)). In this case, the court explained, "[w]hat made the conduct * * * a fraud was that Winans knew he was not supposed to leak the timing or contents of his articles or trade on that knowledge. * * * Winans breached the [Dow Jones] policy and he knew he was breaching it" (*id.* at 58a-59a).

The court also held that the government had established its allegations of mail and wire fraud, explaining that Winans' breach of duty and failure to disclose material information to the Journal served as an appropriate basis for the prosecution; the court noted Winans' "awareness that he had a duty not to disclose the content and timing of publication of the column as well as a duty to disclose, at the very least, any leaks of the column" (Pet. App. 62a). The court also found that the scheme involved "the fraudulent misappropriation or theft of the Journal's property" and that "[t]he scheme's injurious consequences to the Journal must have been known to Winans" (*id.* at 64a). Finally, the court held that the telexing of articles for printing and the mailing of the Journal to subscribers were "integral part[s] of the scheme to defraud" (*id.* at 66a).

4. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-29a).[3] Addressing the securities law counts, the court found that Winans "breached a duty of confidentiality to his employer by misappropriating from the *Journal* confidential prepublication information" (*Id.* at 10a). This misconduct, the court explained, implicated Section 10(b) and Rule 10b-5, which "broadly proscribe[] the conversion by 'insiders' *or others* of material nonpublic information in connection with the purchase or sale of securities" (Pet. App. 11a (emphasis in original)). And "the use of the misappropriated information for the financial benefit of [petitioners] and to the financial detriment of those investors with whom [petitioners] traded," the court held, "supports the conclusion that [petitioners'] fraud was 'in connection with' the purchase or sale of securities under section 10(b) and Rule 10b-5" (*id.* at 18a).

The court found it unnecessary to "dwell at length on [petitioners'] convictions for violating federal mail and wire fraud statutes" (Pet. App. 23a). The court explained that confidential commercial information "may constitute fraudulently misappropriated 'property' under the mail fraud statute" (*ibid.*), and that petitioners' scheme to misappropriate nonpublic information from the Journal accordingly fell within the scope of 18 U.S.C. 1341 and 1343 (Pet. App. 24a). The court also concluded that the "foreseeability and centrality to the scheme" of the mailings and wirings associated with the publication and distribution of the Journal "were sufficient predicates to allow a conclusion that [petitioners] violated the mail and wire fraud statutes" (*id.* at 25a).[4]

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[3] The court of appeals reversed Winans' conviction on several counts involving trading by Felis that was outside the scope of the conspiracy (Pet. App. 26a-27a).

[4] Judge Miner joined the court's opinion insofar as it upheld petitioners' convictions on the mail and wire fraud counts, but he dissented from the court's holding on securities fraud (Pet. App.

ARGUMENT

Petitioners contend that their trading on misappropriated information violated neither the securities laws nor the federal mail and wire fraud statutes. These contentions are without merit. Both aspects of the court of appeals' holding were correct. The court's decision upholding petitioners' securities fraud convictions, moreover, involved a legal issue that has not been addressed outside the Second Circuit; its decision on the mail and wire fraud counts involved the application of settled principles. These holdings thus do not conflict with any rulings of this Court or of the other courts of appeals. Consideration of the case by this Court is unwarranted.

1. a. The securities fraud aspect of this case involves legal issues that have not been widely considered by the courts. The Second Circuit is the only court of appeals that has yet had occasion to address the "misappropriation of confidential information theory" upon which petitioners' convictions under Section 10(b) and Rule 10b-5 were based.[5] And as petitioners themselves recognize (Pet. 9), the factual background in this case—where the confidential information was misappropriated from a nonparticipant in the market—"make[s] it one of first impression even for the Second Circuit."[6] In the absence of

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27a-29a). He reasoned that "[n]o confidential securities information imparted by reason of any special relationship was purloined by [petitioners]," concluding that petitioners' "conduct is addressed adequately by statutes establishing the mail and wire fraud offenses of which [petitioners] stand convicted" (*id.* at 28a-29a).

[5] See *SEC* v. *Materia*, 745 F.2d 197 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *United States* v. *Newman*, 664 F.2d 12 (2d Cir. 1981), aff'd after remand, 722 F.2d 729 (2d Cir.), cert. denied, 464 U.S. 863 (1983). Cf. *Rothberg* v. *Rosenbloom*, 771 F.2d 818, 825 (3d Cir. 1985) (Higginbotham, J., concurring).

[6] In the other cases applying the theory, the misappropriated information derived from a market participant—a party planning a tender offer. See *SEC* v. *Materia, Supra; United States* v. *Newman, Supra*;

discussion of the issue by other courts (let alone a split in the circuits), consideration by this Court of the issues presented here would be premature.

b. In any event, petitioners' challenge to their securities fraud convictions is without merit. Section 10(b) prohibits the use, "in connection with the purchase or sale of any security," of "any manipulative or deceptive device or contrivance" in violation of rules promulgated by the SEC. Rule 10b-5 (emphasis added) in turn prohibits "*any* person" from engaging in "*any* act [or] practice" that "operates or would operate as a fraud or deceit upon *any* person" in connection with the purchase or sale of securities. This Court has consistently construed these provisions broadly, noting that Section 10(b) is "a 'catchall' clause to enable the Commission to 'deal with new manipulative or cunning devices' " (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203 (1976) (brackets omitted)) and that the statute and rule "are obviously meant to be inclusive." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972). See generally *Herman & Maclean* v. *Huddleston*, 459 U.S. 375, 386 (1983); *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979). See also S. Rep. 792, 73d Cong., 2d Sess. 6 (1934).

Against this background, the court of appeals properly held (Pet. App. 17a-18a) that petitioners' conduct amounted to a "fraud or deceit" within the meaning of Section 10(b) and Rule 10b-5. While petitioners find it anomalous that the fraudulent conduct here involved the breach of a duty to an employer (Pet. 11), Winans in fact

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SEC v. *Gaspar*, [1984-85] Fed. Sec. L. Rep. (CCH) ¶ 92,004 (S.D.N.Y. Apr. 15, 1985); *SEC* v. *Musella*, 578 F. Supp. 425 (S.D.N.Y. 1984).

misappropriated—"stole, to put it bluntly" (*Chiarella* v. *United States*, 445 U.S. 222, 245 (1980) (Burger, C.J., dissenting))—nonpublic information in breach of a duty of confidentiality.[7] "In other areas of the law, deceitful misappropriation of confidential information by a fiduciary, whether described as theft, conversion, or breach of trust, has consistently been held to be unlawful." *United States* v. *Newman*, 664 F.2d 12, 18 (2d Cir. 1981), aff'd after remand, 722 F.2d 729 (2d Cir.), cert. denied, 464 U.S. 863 (1983). This Court has noted that "misappropriation is a 'garden variety' type of fraud." *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 11 n.7 (1971).[8]

Likewise, petitioners' fraud plainly occurred "in connection with" their purchases and sales of securities. Obviously, the "sole purpose" of petitioners' misappropriation scheme was to trade securities using the stolen information and thereby to " 'reap instant no-risk profits in the stock market' " (Pet. App. 19a-20a, quoting *SEC* v. *Materia*, 745 F.2d 197, 203 (2d Cir. 1984), cert. denied, No. 84-1036 (Apr. 22, 1985)). "[T]he misappropriated information had 'no value whatsoever' * * * except 'in connection with'

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[7] The Journal's policy, moreover, expresses recognized principles of law. As the court of appeals noted (Pet. App. 21a n.11), in some jurisdictions theft or embezzlement of certain confidential information is a statutory crime. The court also observed that, under the common law, " 'unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another * * * unless the information is a matter of general knowledge.' " *Id.* at 10a n.5 (quoting Restatement (Second) of Agency § 395 (1958)).

[8] Outside the securities context, the Court also has found similar breaches of fiduciary duty to be fraudulent. See, *e.g.*, *United States* v. *Carter*, 217 U.S. 286, 305-310 (1910); *Wardell* v. *Railroad Co.*, 103 U.S. 651, 654-659 (1880).

[petitioners'] subsequent purchase[s and sales] of securities' " (*id.* at 19a, quoting *SEC* v. *Materia*, 745 F.2d at 203). Indeed, this Court has twice suggested that trading on "misappropriate[d] or illegally obtain[ed] information"—the activity in which petitioners engaged—constitutes fraud in violation of Rule 10b-5. *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 313 n.22 (1985); *Dirks* v. *SEC*, 463 U.S. 646, 665 (1983).[9] See also H.R. Rep. 98-355, 98th Cong., 1st Sess. 4-5, 14-15 (1983).[10]

Petitioners nevertheless assert (Pet. 9-13) that their scheme did not violate Rule 10b-5 because the Journal, the party whose information they deceitfully misappropriated and traded upon, was not itself a participant in the market. But both the language and the purpose of Rule 10b-5 fit this case. The rule proscribes any scheme that operates as a fraud "upon any person" "in connection with the purchase or sale of any security." See *Naftalin*, 441 U.S. at 773 (stating, with respect to language nearly iden-

[9] Indeed, four Justices have read Section 10(b) and Rule 10b-5 "to mean that a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading." *Chiarella*, 445 U.S. at 240 (Burger, C.J., dissenting). See *id.* at 239 (Brennan, J., concurring in the judgment); *id.* at 245 (Blackmun, J., joined by Marshall, J., dissenting). The other members of the Court found it inappropriate to address the validity of the misappropriation theory in *Chiarella*. See *id.* at 235-237; *id.* at 238 (Stevens, J., concurring).

[10] There is no merit to petitioners' suggestion (Pet. 12) that the decision of the court of appeals is inconsistent with *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977). *Santa Fe Industries* held that breach of a fiduciary duty by corporate management, which is primarily a concern of state law, does not violate Rule 10b-5 when unaccompanied by "any deception, misrepresentation, or nondisclosure." 430 U.S. at 476. But petitioners engaged in just that sort of fraudulent misconduct. Nothing in *Santa Fe Industries* stands for the proposition that fraudulent conduct in connection with trading in securities may not be prosecuted under Rule 10b-5 when it also involves a breach of duty that is actionable under state law.

tical to that of Rule 10b-5(a), that "nothing in [Section 17(a)(1) of the Securities Act] creates a requirement that injury occur to a purchaser").[11]

Moreover, the obvious purpose of petitioners' fraud against the Journal was to obtain an advantage—one that was made possible by Winans' misappropriation of confidential information—over other buyers and sellers of securities. Thus the court of appeals specifically found (Pet. App. 18a) that petitioners used the information they misappropriated "for [their own] financial benefit * * * and to the financial detriment of those investors with whom [they] traded," adding that "those who purchased or sold securities without the misappropriated information would not have purchased or sold, at least at the transaction prices, had they had the benefit of that information."

c. Despite petitioners' contention to the contrary (Pet. 11, 13), there is nothing anomalous in the use of the misappropriation theory against an employee when it could not have been applied against the employer (in this case, the Journal) had the employer sought to trade on the misappropriated information. As the court of appeals explained (Pet. App. 21a), petitioners' argument "illogically casts the thief and [his] victim in the same shoes." The fraud that triggered application of Section 10(b) and Rule 10b-5 here was petitioners' *misappropriation* of confidential information and attendant breach of fiduciary duty to the Journal. See Pet. App. 15a-16a, 57a-58a.[12] Because

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[11] The plaintiff in a private action for damages under Section 10(b) and Rule 10b-5 must be a purchaser or seller of securities. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). This Court has made clear, however, that the purchaser-seller requirement is inapplicable in a government law enforcement action. *Id.* at 751 n.14, citing *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 467 n.9 (1969). See also *Naftalin*, 441 U.S. at 774 n.6.

[12] Hence, there also is no basis for petitioners' suggestion (Pet. 13 & n.19) that the decision below adopts a "parity of information" rule.

the Journal obviously cannot misappropriate anything from itself, any liability for its use of the information necessarily would have to rest on a different legal theory. In any event, petitioners' contentions about the Journal's potential liability for trading on *its own* information involve hypothetical issues that simply have no bearing on this case. The Journal effectively announced (through the very policy that Winans violated) that it would not engage in such conduct, it in fact did not do so—and the court of appeals left open the possibility that the Journal would be liable if it did engage in trading of that sort.[13]

Petitioners also argue (Pet. 13-15) that the nonpublic information involved in this case—Winans' advance knowledge of the timing and tenor of Heard columns—is not sufficiently securities-related to be the predicate for a violation of Section 10(b) and Rule 10b-5 because it did not bear on the "value or investment worthiness" of the stocks mentioned in the Heard columns. This contention

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Explicitly rejecting this contention, the court of appeals stated (Pet. App. 15a-16a):

> We do not say that merely using information not available or accessible to others gives rise to a violation of Rule 10b-5. * * * There are disparities in knowledge and the availability thereof at many levels of market functioning that law does not presume to address. * * * Obviously, one may gain a competitive advantage in the marketplace through conduct constituting skill, foresight, industry and the like. * * * But one may not gain such advantage by conduct constituting secreting, stealing, purloining or otherwise misappropriating material nonpublic information in breach of an employer-imposed fiduciary duty of confidentiality.

[13] The court of appeals recognized that this case does not present the question whether a legal theory other than the one used against petitioners would have precluded the Journal from trading on this information (Pet. App. 20a n.10). Cf. *Zweig* v. *Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979) ("scalping" theory of liability under Rule 10b-5); *SEC* v. *Blavin*, 557 F. Supp. 1304 (E.D. Mich. 1983), aff'd, 760 F.2d 706 (6th Cir. 1985) (scalping) (cited with approval in *Lowe* v. *SEC*, 472 U.S. 181, 209-210 n.56 (1985)).

plainly is without merit. Cf. *Dirks*, 463 U.S. at 657 n. 15. As the court of appeals noted, the information stolen by Winans unquestionably was material (Pet. App. 19a n.9). See *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976). The Heard column had an immediate effect on the market price of the securities discussed in it. And petitioners themselves obviously believed that their advance knowledge of the Journal's publication plans was significant, for their entire scheme was premised on their ability to trade securities prior to publication of articles and thus to profit from the market's response.

In short, petitioners simply miss the point in asserting (Pet. 12) that their convictions should be overturned because Section 10(b) and Rule 10b-5 "protect investors, not reputations." In making this argument, petitioners fail to acknowledge the obvious: that their trading directly undermined the integrity of the securities markets. Their scheme permitted them to make trades that otherwise would not have occurred, and to do so with an advantage grounded on their use of fraudulently misappropriated information that was not lawfully available to the other parties to the transactions. Such conduct is the antithesis of the "open and honest market" for securities that Section 10(b) was intended to protect. *Materia*, 745 F.2d at 203. See *Naftalin*, 441 U.S. at 775 (emphasis omitted) (the securities laws aim " 'to achieve a high standard of business ethics * * * in every facet of the securities industry' ") (quoting *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-187 (1963)); see also *United States* v. *Brown*, 555 F.2d 336, 339 (2d Cir. 1977).

2. Petitioners also take issue with their mail and wire fraud convictions. It is revealing, however, that their challenge to the court of appeals' holding is grounded principally on *dissenting* opinions issued by judges in the Second and other circuits. See Pet. 15 nn. 21, 22; 17 nn. 30, 31, 33; 20 n.48; 22-23; 23 nn. 55-56. In fact, as peti-

tioners' own citations to *majority* decisions demonstrate (see Pet. 17 nn. 34, 35, 36), the court of appeals' unanimous holding affirming the mail and wire fraud convictions in this case involved the unexceptional application of settled law.

a. Petitioners first assert (Pet. 18-20) that their trading on misappropriated information did not amount to a "scheme or artifice to defraud" within the meaning of 18 U.S.C. 1341 and 1343 because it was grounded "*solely*" (Pet. 18 (emphasis in original)) on Winans' breach of fiduciary duty to the Journal. This contention is without merit. The courts uniformly have held that "the type of fraud which is perpetrated through a breach of the fiduciary duty owed by an employee to his employer [is] actionable under the mail and wire fraud statutes" (*United States* v. *Conner*, 752 F.2d 566, 572 (11th Cir. 1985), cert. denied *sub nom. Taylor* v. *U.S.*, No. 84-1853 (Oct. 7, 1985)), at least where the employee fails to disclose relevant information to the employer.[14] This reading of the statute is hardly of recent vintage, as petitioners suggest (Pet. 17). See, *e.g.*, *United States* v. *Groves*, 122 F.2d 87, 90 (2d Cir.), cert. denied, 314 U.S. 670 (1941). See generally

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[14] See, *e.g.*, *United States* v. *Weiss*, 752 F.2d 777, 784 (2d Cir. 1985), cert. denied, No. 84-1645 (Nov. 4, 1985); *United States* v. *Lemire*, 720 F.2d 1327, 1335-1336 (D.C. Cir 1983), cert. denied, 467 U.S. 1226 (1984); *United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir.), cert. denied, 464 U.S. 939 (1983); *United States* v. *Bronston*, 658 F.2d 920, 926 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Shamy*, 656 F.2d 951, 957 (4th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *United States* v. *Von Barta*, 635 F.2d 999, 1006 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Castor*, 558 F.2d 379, 383 (7th Cir. 1977) (dictum), cert. denied, 434 U.S. 1010 (1978); *United States* v. *Keane*, 522 F.2d 534, 544-546 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); *United States* v. *Bryza*, 522 F.2d 414, 421-422 (7th Cir. 1975), cert. denied 426 U.S. 912 (1976). Cf. *Gregory* v. *United States*, 253 F.2d 104, 109 (5th Cir. 1958).

Epstein v. *United States*, 174 F.2d 754, 766-767 (6th Cir. 1949). And the courts below found just such conduct in this case, where Winans' actions "establishe[d] his awareness that he had a duty not to disclose the content and timing of publication of the [Heard] column as well as a duty to disclose, at the very least, any leaks of the column" (Pet. App. 62a; see *id.* at 24a).[15]

This is not a case, moreover, in which the fraud involved "technical" breaches of duty or "trivial" misconduct (see Pet. 18). Petitioners' actions amounted, as we explain above, to a criminal violation of the securities laws. Even apart from that, those actions—which were part of a scheme "to filch from [the Journal] its valuable property by dishonest, devious, and reprehensible means" (Pet. App. 62a-63a n.13)—were similar to conduct that is criminal in a number of jurisdictions, that would be treated as an actionable breach of common law duties almost everywhere, and that long have been condemned as fraudulent (see page 9 & notes 7, 8, *supra*).[16] Petitioners' further observations that the Journal's rule of confidentiality was imposed unilaterally (Pet. 18), that an employee might learn of the rule only after commencing employment (Pet. 19), and that the court of appeals' ruling might be applicable in other factual settings (Pet. 20), are

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[15] The other petitioners, who schemed to take advantage of Winans' breach of duty, are equally liable for that breach. See *United States* v. *Alexander*, 741 F.2d 962, 964 (7th Cir. 1984).

[16] Petitioners assert (Pet. 18-19 & n.41) that the Journal's rules regarding confidentiality are not common practice in the industry. As the government explained to the court of appeals, however (C.A. Br. 63 n.**), the single newspaper story upon which petitioners rely for this surprising proposition was not admitted into evidence for this purpose by the district judge; in any event, the government pointed to other accounts indicating that most newspapers and magazines do in fact have a policy similar to that of Dow Jones.

simply beside the point: in this case, the fraudulent conduct plainly was improper, and was understood to be so by Winans and his colleagues (see Pet. App. 62a-63a).

b. Petitioners also contend (Pet. 20-21) that the harm inflicted on the immediate victim of their fraud—the injury to the Journal and its reputation—was not of a sort that can support a conviction under the mail and wire fraud statutes. Again, this assertion cannot be reconciled with the uniform holdings of the courts of appeals. The courts have made it clear that a scheme contemplating injury even to an intangible interest of the victim, such as one defrauding an employer of the loyal services of its employee, falls within the ambit of Sections 1341 and 1343.[17] Here, the Journal's reputation for integrity, while intangible, is "probably its most important asset" (Pet. App. 64a); petitioners' scheme posed the risk of causing "potentially devastating harm" to that asset (*id.* at 65a). And beyond the injury to the Journal's reputation, as the district court explained, "the fraudulent misappropriation or theft of the [Journal's] property [that is, its confidential publication information] is in itself sufficient to satisfy the requirement of contemplation of harm. The theft of valuable property is of course a crime even if the victim is unaware of the loss." *Id.* at 64a.

c. Finally, petitioners assert (Pet. 21-23) that they failed to "cause" the interstate mailings and wirings in this case with the "purpose" of executing their scheme. But Sections 1341 and 1343 never have been understood to re-

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[17] See, *e.g.*, *United States* v. *Lemire*, 720 F.2d 1327, 1337 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *United States* v. *Margiotta*, 668 F.2d 108, 121 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Condolon*, 600 F.2d 7, 9 (11th Cir. 1979); *United States* v. *Louderman*, 576 F.2d 1381, 1387 (9th Cir.), cert. denied, 439 U. S. 896 (1978); *United States* v. *Castor*, 558 F.2d 379, 383 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978); *United States* v. *States*, 488 F.2d 761, 763-765 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974).

quire that the defendant personally deposit an item in a mailbox or place a call on a telephone. Instead, it is well-settled that "[w]here one does an act with knowledge that use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen * * * then he 'causes' the mails to be used." *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954) (citation omitted; emphasis in original).

In this case, Winans produced his columns and delivered them to his editors not only with the knowledge, but with the expectation and intention that they be wired to the Journal's printing plant and mailed to the Journal's subscribers. And "[t]his is hardly a situation where the nexus between the mailings and wirings and the alleged fraud is too remote; without publication and distribution of the copies of the Journal containing the columns in question there would be no point to the scheme" (Pet. App. 66a (footnote omitted)).[18] Where the defendant

[18] For this reason, the cases relied upon by petitioners for the proposition that their actions failed to satisfy the mailing and wiring requirements of Sections 1341 and 1343 (*United States* v. *Maze*, 414 U.S. 395 (1974); *Parr* v. *United States*, 363 U.S. 370 (1960); *Kann* v. *United States*, 323 U.S. 88 (1944); *United States* v. *Castile*, 795 F.2d 1273 (6th Cir. 1986); *United States* v. *Tarnopol*, 561 F.2d 466 (3d Cir. 1977)) (see Pet. 21, 23 n.54) are simply inapposite. Those cases held that—regardless of whether the defendants in fact "caused" the mailing (see *Maze*, 414 U.S. at 399)—the requirements of the mail fraud statute were not satisfied when "there was not a sufficient connection between the mailing and the execution of the defendants' scheme." *Id.* at 401. See *Kann*, 323 U.S. at 94; *Parr*, 363 U.S. at 391; *Castile*, 795 F.2d at 1278-1281; *Tarnopol*, 561 F.2d at 471-472. Here, in contrast, the mailings and wirings were essential to the success of petitioners' fraud. Petitioners' further argument (grounded on the dissenting opinion in *United States* v. *Green*, 786 F. 2d 247, 256-258 (7th Cir. 1986)) that they did not cause the mailings and wirings for the "purpose" of executing their scheme because they simply took advantage of material that had been mailed and wired for a lawful purpose advances an unnaturally crabbed reading of the statutes: Winans introduced columns into the interstate mails and onto the interstate

delivers materials for transportation interstate through the wires and mails, with the intention of using those materials (once transported) in a scheme to defraud, the requirements of Sections 1341 and 1343 are satisfied. See *United States* v. *Muni*, 668 F.2d 87, 89 (2d Cir. 1981); *United States* v. *Castor*, 558 F.2d 379, 385 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978); *Gregory* v. *United States*, 253 F.2d 104, 109 (5th Cir. 1958). Cf. *United States* v. *Green*, 786 F.2d 247, 250 (7th Cir. 1986).[19]

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wires with the intention of using those columns to perpetrate a fraud, and with the knowledge that the columns would not be published if he disclosed his breach of duty.

[19] The other decisions cited by petitioners (Pet. 23-24 n.56) as rejecting this settled reading of the mail and wire fraud statutes are entirely off the point. *United States* v. *Hewes*, 729 F.2d 1302, 1322 (11th Cir. 1984), cert. denied *sub nom. Caldwell* v. *U.S.*, 469 U.S. 1110 (1985), held only that the mailings must play an integral role in the defendant's scheme. *United States* v. *Rabbitt*, 583 F.2d 1014, 1025-1026 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), and *United States* v. *McNeive*, 536 F.2d 1245, 1250-1251 (8th Cir. 1976), found the mail fraud statute inapplicable in cases where the defendants' conduct did not harm the "victims." And in *United States* v. *Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *United States* v. *Edwards*, 458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1972); and *United States* v. *Kelem*, 416 F.2d 346, 347 (9th Cir. 1969), cert. denied, 397 U.S. 952 (1970), the courts *affirmed* convictions under the mail and wire fraud statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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